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No. 01-718

In The

Supreme Court of the United States

MANUEL A. BARALT and JUAN GONZÁLEZ,

Petitioners,

v.

NATIONWIDE MUTUAL INSURANCE COMPANY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Should not this Court deny certiorari where a Court of Appeals has reversed a jury's age discrimination verdicts for plaintiffs on their Puerto Rico Law 100 and ADEA claims because there was no evidence of age discrimination; where the Law 100 burden of proof is considerably more favorable to plaintiffs than the ADEA burden of proof; where, at oral argument, the parties expressly agreed with the Court of Appeals that if plaintiffs did not prevail as a matter of law on their Law 100 claims, then *á fortiori* they could not prevail on their ADEA claims; where the Court of Appeals, after carefully reviewing the evidence at trial, found no evidence of age discrimination under Law 100 and therefore none under the ADEA as well; where the Court of Appeals has followed this Court's ADEA decision in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000); where the Court of Appeals decision is based primarily on Law 100; where the Court of Appeals has expertise in Puerto Rico law; and where the Court of Appeals decision is highly fact-specific?

CORPORATE DISCLOSURE STATEMENT

Nationwide Financial Services, Inc., which was formed in November of 1996, is the only publicly held corporation of all of the Nationwide Insurance companies. The public ownership of that company amounts to 18.4%. The remaining 81.6% ownership of that company belongs to Nationwide Corporation. On the other hand, 95.3% of Nationwide Corporation is owned by Nationwide Mutual Insurance Company, Respondent in the present case. The other 4.7% of Nationwide Corporation is owned by Nationwide Mutual Fire Insurance Company. Nationwide Mutual Insurance Company is a mutual insurance company and its entire ownership belongs to its policyholders.

Both Nationwide Financial Services, Inc. and Nationwide Corporation act as holding corporation of all of the Nationwide companies.

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BRIEF IN OPPOSITION

Respondent Nationwide Mutual Insurance Company (hereinafter "Respondent" or "Nationwide"), respectfully prays that the Petition for Writ of Certiorari sought in this matter be denied.

STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

The Complaint in this case was filed on November 21, 1995, by Petitioners Manual A. Baralt (Baralt), Juan Gonzalez (Gonzalez) ("Petitioners"), and their respective wives, against Nationwide. The Complaint contained three (3) causes of action for alleged damages due to (i) age discrimination under both the Federal Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. § 623(a)(1) (the "ADEA") and Puerto Rico's Law 100, P.R. Laws Ann. tit. 29, § 146 ("Law 100"); (ii) wrongful termination of employment under Puerto Rico's Law 80, P.R. Laws Ann. tit. 29, §§ 185a-185m ("Law 80"); and (iii) Puerto Rico's libel and slander statute, P.R. Laws Ann. tit. 32, §§ 3141-3149.[1] The jurisdiction of the District Court was predicated on 28 U.S.C. §§ 1331, 1332 and 1367.

Following a trial, the jury returned a verdict based on findings of age discrimination by Respondent against Petitioners under the ADEA and Law 100. The jury also

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[1] At the conclusion of their case in chief and more than three (3) years after the filing of the Complaint, Petitioners "abandoned" their cause of action for libel and slander.

returned a verdict for Petitioners for unjust dismissal under Puerto Rico's Law 80. In its verdict, the jury awarded Petitioners Baralt and Gonzalez $1,000,000.00 and $1,500,000.00 in compensatory damages, as well as $500,000.00 and $400,000.00 in back pay, respectively. The verdict was subsequently enhanced by the District Court by doubling the compensatory damages awarded to Petitioner Baralt to $2,000,000.00 and to Petitioner Gonzalez to $3,000,000.00, pursuant to the provisions of Law 100.

After the trial, Respondent filed a motion for judgment as a matter of law under Fed.R.Civ.P. 50(b) or, in the alternative, for a new trial under Fed.R.Civ.P. 59. On February 23, 2000, the District Court issued its Opinion and Order denying Respondent's motion. In the Opinion and Order, it acknowledged that Petitioners failed to present direct evidence of age discrimination and that the burdens of proof therefore fell within the *McDonnell Douglas*[2] framework. The District Court then determined that: "(1) [Petitioners] made out a *prima facie* case; (2) [Respondent] presented its reasons for the dismissals; and (3) [the jury concluded that] the reasons were a sham or not valid." *Baralt v. Nationwide Mutual Insurance Co.*, 86 F.Supp.2d 31, 37 (D.P.R. 2000).

Next, the District Court held that under *McDonnell Douglas* the remaining issue was "whether [Petitioners] provided enough evidence for the jury to find that age was the real reason why Nationwide fired Baralt and Gonzalez." *Id.* In concluding that Petitioners had done so

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[2] *McDonnell Douglas Corporation v. Green*, 411 U.S. 792 (1973).

under the ADEA, and consequently under Law 100 as well, the District Court strained to find some evidentiary support in the record. It was forced to rely *solely* on a passage of a witness's testimony in which she stated that Nationwide "had a company-wide retirement plan of which she had taken advantage." *Baralt v. Nationwide Mutual Insurance Co.*, 251 F.3d 10, 16 (1st Cir. 2001). From that passage alone, *and with no other reference to age in the record*, the District Court erroneously concluded that "[t]he jury could have found that [Respondent] had a retirement plan to cut payroll implemented throughout the nation; [that Respondent's] headquarters fired [Petitioners] without valid reasons; and that [the] retirement plan was implemented to help or force older employees to retire". *Id.*

On February 29, 2000, Respondent filed a Notice of Appeal before the United States Court of Appeals for the First Circuit. In its appeal, Respondent argued, *inter alia*, that the District Court erred in denying Respondent's request under Fed.R.Civ.P. 50(b) and 59, in view of the fact that:

> In the present case, there was no legally sufficient evidentiary basis for a reasonable jury to find that [Respondent] discriminated against [Petitioners] on the basis of age in violation of the ADEA and Law 100.

After oral argument on March 8, 2001, the First Circuit looked carefully at the evidence presented at trial and ruled on May 24, 2001, that Nationwide, as a matter of law, had carried its burden of proving under Law 100, and therefore *á fortiori* under the ADEA, that it did not terminate Petitioners because of their age.

At the outset, the First Circuit observed: "[P]laintiffs' affirmative showing of age discrimination consisted entirely of three facts: they were within the protected class, they were fired, and one of them was replaced by someone significantly younger – though that individual was still within the protected age group." *Baralt*, 251 F.3d at 17. Using a Law 100 lens which placed the burden of proving the absence of age discrimination on Nationwide, the First Circuit next went through all of the evidence. This included the all-important fact that the investigation was triggered in 1993 by employees in the Puerto Rico office and not by the home office executives who terminated the Petitioners, thereby making it unlikely that the inquiry was a ruse to terminate based on age. *Id.* at 18.

The First Circuit, pointing out that the Petitioners "presented no evidence to discredit the authenticity of the investigation", *id.*, concluded that no reasonable jury could have found that Respondent terminated Petitioners because of their age under Law 100, and, hence, also under the ADEA. Its Opinion and Order reversed the judgment for Petitioners on the age discrimination counts, vacated the award of attorneys' fees and remanded the case to the District Court "for further proceedings as necessary to enter judgment in connection with the claim for unjust dismissal under Law 80." *Baralt*, 251 F.3d at 21.

On August 24, 2001, the Court of Appeals denied Petitioners' request for rehearing and the suggestion for rehearing *en banc*.

B. THE EVIDENCE PRESENTED AT TRIAL

This case arises from the termination of Petitioners Baralt and Gonzalez by Respondent Nationwide. At the time of his termination, Petitioner Gonzalez had been employed by Respondent for twenty-eight (28) years and held the position of Manager of the Personnel and Commercial Lines Department in Nationwide's Puerto Rico Office ("NPRO"). Petitioner Baralt held the position of Claims Manager in NPRO when he was terminated, and had been employed by Respondent for twenty-five (25) years. Both Petitioners were members of a group of NPRO managers who collectively were known as "the Cabinet".

At trial, Petitioners contended that their employment was terminated as a result of a plan and scheme devised by Respondent to terminate them, along with seven (7) other employees, because of their ages. Respondent contended that the terminations resulted *solely* from Petitioners' interference with an internal investigation of NPRO and the findings of irregularities committed by them and discovered during that investigation.

Respondent's investigation of the NPRO began in October 1993 when Joanne McGoldrick (McGoldrick), a seasoned investigator in Respondent's Corporate Security Department, was assigned the task of investigating allegations of fraud by an adjuster by the name of Javier Quinones (Quinones) who worked at NPRO. McGoldrick returned to Puerto Rico in January 1994, to continue the investigation, and was scheduled to return again in April of that year. Before returning, McGoldrick was, on two

occasions, contacted via telephone by Blanca Robles (Robles), NPRO Marketing Department Manager. In those conversations, Robles informed McGoldrick of irregularities that had occurred at NPRO involving the Vice President in charge of NPRO, Enrique Lopez (Lopez).

First, Robles stated to McGoldrick that Lopez had, with the assistance of Petitioner Gonzalez, procured an insurance policy for a Plymouth Sundance by representing that it was housed in Puerto Rico and that his wife was the principal operator. In fact, the vehicle was housed in Ohio and the principal operator was Lopez's son. Second, Robles told McGoldrick that members of Lopez's household were driving company owned or pool cars for personal use. Finally, Robles reported that Lopez had removed a British Sterling vehicle from Respondent's salvage lot and used it personally for a period of time. In addition to the allegations relating directly to Lopez, McGoldrick received allegations regarding a general misuse of salvage and pool vehicles and also of employees being charged for parking. These allegations were given a priority resolution status, and McGoldrick was assigned the task of conducting an investigation.

At trial, McGoldrick testified that her investigation was hindered by the actions of both Petitioners. Twice during the investigation, McGoldrick saw two (2) female employees crying; she asked them why, and as a result of their reply, McGoldrick went to Petitioner Gonzalez and told him: "Stay out of this investigation. You're intimidating people, they're afraid to talk, they're crying". *Baralt*, 251 F.3d at 14 n.2. She also warned Petitioner Gonzalez to "refrain from contacting [employees] because [he] could be subject to disciplinary action [including]

. . . termination". *Id.*[3] Also, on multiple occasions, McGoldrick "found [Petitioner] Gonzalez standing near an office where she was interviewing employees." *Id.*

On his part, Petitioner Baralt interfered with the investigation by breaching its confidentiality after he had been specifically instructed not to do so. At trial, Petitioner Baralt acknowledged that he had been given this instruction stating that he was told to keep the investigation at a level where no comments would be made to anyone about it. During the investigation, McGoldrick received substantial information indicating that Petitioner Baralt had not complied with this instruction. For instance, NPRO Division Manager, Antonio Lopez, told McGoldrick that "[Petitioner] Baralt had contacted all of the claims division employees who possessed salvage

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[3] At page 12 of the Petition, Petitioners misstate the record by asserting that "with respect to the allegations that Gonzalez interfered with an ongoing investigation, the evidence submitted at the trial revealed that the Respondent was unable to produce any witness with personal knowledge who could testify that Gonzalez interfered with the internal investigation. . . . " However, as the First Circuit correctly pointed out, the evidence presented at trial showed that during the investigation, "McGoldrick accused Gonzalez of intimidating two female employees, whom she had found crying." *Baralt*, 251 F.3d at 14. It explained: "The hearsay rule prevented McGoldrick from specifically relating what the two employees said to her, but she testified that, after the first such encounter, she went to Gonzalez's office and said: 'Stay out of this investigation. You're intimidating people, they're afraid to talk, they're crying.' After the second encounter, she said she asked Gonzalez 'to please refrain from contacting our people because it could be subject to disciplinary action up until grounds for termination'." *Baralt*, 251 F.3d at 14 n.2.

vehicles 'and warned them of the scope of the investigation'. . . . " McGoldrick also discovered that Petitioner Baralt also "advised [the employees] not to tell the truth or they would lose their jobs". *Id.* Finally, McGoldrick testified that "other employees had stated that [Petitioner] Baralt had discussed the interview he had with investigators even though he had been told expressly of the requirement of confidentiality."[4] *Id.* (footnote omitted).

This interference notwithstanding, McGoldrick was able to conclude her investigation and confirmed the accuracy of the allegations against Lopez. Specifically, she determined that a pool car had not only been used by Lopez's oldest son, but was also taken to Lopez's home on weekends and used by his younger son when he came

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[4] At page 13 of the Petition, Petitioners again misstate the record by asserting that "with regards to the allegation that Baralt told an employee to lie to the investigator, the evidence at trial showed that said allegation was based on inadmissible hearsay since the Respondent presented no witness with personal knowledge to sustain the allegation." However, as correctly noted by the Court of Appeals:

> In a report admitted as a [joint] trial exhibit, McGoldrick stated that "another employee told her that Baralt had contacted all of the claims division employees who possessed salvage vehicles 'and warned them of the scope of our investigation' and advised them not to tell the truth or they would lose their jobs. She further reported that other employees had stated that Baralt had discussed the interview he had with investigators even though he had been told expressly of the requirement of confidentiality."

Baralt, 251 F.3d at 14 (footnote omitted).

home from college on breaks. McGoldrick also determined that Lopez had taken the salvage Sterling in violation of normal salvage handling procedures and housed it in his second home in Dorado for more than one year.[5] Finally, McGoldrick's investigation revealed that Lopez had in fact obtained an insurance policy on the Plymouth Sundance for his son in Ohio by falsely representing that his wife was the principal operator and that the car was in Puerto Rico. These misrepresentations were designed, McGoldrick found, to procure lower premium rates than Lopez's son could have obtained by providing accurate information. Lopez was ultimately terminated as a result of his conduct.

McGoldrick also determined that other employees had engaged in wrongdoing. For example, adjusters Norberto García, Miguel Carrillo and Víctor Rivera, as well as Antonio Lopez and his secretary, Antonia Ayala, had all misappropriated salvage vehicles without paying for them. All of these employees were terminated. Additionally, McGoldrick determined that NPRO Comptroller, Luis Flores Dieppa, had lied about his knowledge of the misappropriation of salvage vehicles, and was likewise terminated.

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[5] According to Robles' testimony, during a Cabinet meeting Lopez stated that he had decided to take the salvaged Sterling to the second home to protect it and also to give the appearance that there were people living in his second residence during weekdays. After the meeting, Petitioner Baralt commented to Robles, referring to Lopez, "this guy is too smart for his own good".

The investigation further revealed that Petitioners participated in or fostered the wrongful acts that had occurred at NPRO. For example, McGoldrick discovered that Petitioner Gonzalez was aware that a pool car was being used by Lopez's oldest son and that, in fact, Petitioner Gonzalez was responsible for keeping the car full of gas and running properly for the use of Lopez's son. Petitioner Gonzalez also admitted that he had signed and put the Plymouth Sundance's insurance policy on the books.

On May 10, 1994, Petitioner Gonzalez was confronted regarding these matters by McGoldrick and Jim Lucas, then Respondent's Human Resources officer. Also, present at this meeting was Rafael Gonzalez, NPRO Human Resources Director. Lucas had joined McGoldrick in Puerto Rico to review the results of the investigation and make whatever decisions he thought necessary, including terminations of employment. As McGoldrick and Lucas testified, and Petitioner Gonzalez conceded, Gonzalez admitted that he had signed the policy for the Plymouth Sundance at Lopez's direction. Petitioner Gonzalez did so, by his own admission, with full knowledge that the application contained false representations including that: the car was used for pleasure, the principal operator would be Lopez's wife and the car will be located in Puerto Rico, rather than Ohio where Lopez's son lived.

At trial, McGoldrick and Lucas testified that Petitioner Gonzalez acknowledged at the meeting that he was aware that Lopez's son used pool cars, and that he had assisted in maintaining these cars for Lopez. Lucas further testified that, when Petitioner Gonzalez was asked if he had contacted employees during the investigation, he

replied: "I did. I know I shouldn't have but I did." As a result of Petitioner Gonzalez's involvement in the misuse of pool cars and the procurement of the Plymouth Sundance policy, as well as his misconduct during the investigation, Petitioner Gonzalez's employment was terminated.

With respect to Petitioner Baralt, the investigation revealed that he had met with employees who had salvaged vehicles and had not paid for them and told those employees not to say anything about the vehicles if they wanted to keep their jobs. Further, Petitioner Baralt testified that he was ultimately responsible for Respondent's salvaged vehicles, including the British Sterling that Lopez misappropriated and that it was Respondent's policy to sell salvaged vehicles to the highest bidder immediately in order to offset against losses.

At a meeting held on April 28, 1994, Petitioner Baralt was confronted by McGoldrick and Lucas regarding his involvement with these acts of misappropriation, as well as his interference with the investigation. In this respect, Lucas testified that at the meeting he informed Petitioner Baralt that the investigation revealed that he had met with employees who were in possession of salvaged vehicles for which they had not paid, and directed them not to say anything about those vehicles if they wanted to keep their jobs. Petitioner Baralt acknowledged to Lucas that he had spoken with the employees and he knew "he shouldn't have but he did". Lucas then asked Petitioner Baralt whether he lied to the investigator about employees having salvage vehicles without paying for them, and Petitioner Baralt did not reply.

Lucas then asked Petitioner Baralt whether he had been told to cooperate fully with the investigation and to keep all of the information developed in the strictest of confidence. Petitioner Baralt acknowledged that he had received these instructions. Finally, Lucas asked Petitioner Baralt why he had not followed these instructions and, again, Petitioner Baralt did not reply. As a result of Petitioner Baralt's failure to take action to prevent the misappropriation of salvage vehicles, as well as his interference with the investigation through breaches of confidentiality, he was terminated.

During cross-examination, Petitioners were questioned extensively regarding the basis for their allegations that their terminations were the result of age bias. Petitioner Gonzalez testified that his termination was part of a plan or scheme by Respondent to terminate employees over the age of forty. However, when asked why certain employees over forty, including Rafael Gonzalez, Robles, Manuel Guzman (Guzman), Luis Lugo, and others, were not terminated as part of the scheme, Petitioner Gonzalez simply stated "I don't know". Similarly, when asked whether the other NPRO employees terminated in April and May of 1994 were over forty (40), he again stated that he did not know. Finally, Petitioner Gonzalez acknowledged that after his termination he was replaced by Guzman, who was over forty at the time. Also, in his direct testimony, Petitioner Gonzalez indicated that his replacement, Guzman, was either "41 or 42, maybe 43".

Significantly, when he was asked point blank to explain the basis for his claim that he had been terminated because of his age, Petitioner Gonzalez replied:

> Well, based on the performance that I was realizing or that I was doing, my devotion to the company, the success that the agency was having every year, over 18 long years and always willing to make a maximum effort to the company's benefit, to the benefit of our customers. I was in a good state of health, there was no reason.

Baralt, 251 F.3d at 15.

Further, when Petitioner Gonzalez was asked why Respondent would terminate him because of his age if Respondent was making money, he replied:

> I don't know what the decision was because if I was performing well, I don't know why I was pressured to make that decision and [why] I was separated or fired.

Thus, even when he was asked explicitly on two occasions to provide the evidence in support of his age discrimination claim, Petitioner Gonzalez did not even *utter* the word age.

For his part, Petitioner Baralt initially testified that Respondent's alleged age bias was evidenced by the fact that he was replaced by a "much younger" person. However, after being confronted with an Exhibit on cross-examination, Petitioner Baralt acknowledged that his replacement was 47, merely two years younger than he.[6]

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[6] At page 4 of the Petition, Petitioners yet again misstate the record by asserting that when he was terminated, "[Petitioner] Baralt was initially replaced by a person approximately two years his junior; but shortly thereafter by 'a much younger' person." As correctly pointed out by the First

This revelation notwithstanding, Petitioner Baralt maintained that the difference of two years indicated an age bias.

Finally, Petitioners attempted to attach significance to the fact that an early retirement program was available at the time that they were discharged. However, Respondent submitted unrebutted evidence showing that this program did not target NPRQ employees but rather was available throughout Respondent's entire organization.

REASONS FOR DENYING THE WRIT

The First Circuit's decision does not conflict with this Court's decision in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000). To the contrary, the First Circuit was well aware of *Reeves* and addressed and correctly distinguished it factually in the course of its analysis of Puerto Rico's Law 100 and the evidence presented at trial. In addition, all of the parties expressly agreed at oral argument that if Petitioners Baralt and Gonzalez lost on the merits on their Law 100 claims, then *á fortiori* they would lose on their ADEA claims as well. This is just what happened. The First Circuit's analysis consequently focused primarily on Law 100 and not the ADEA, and its expertise in Puerto Rico's Spanish Civil law should be deferred to.

Circuit, "[a]lthough Baralt at first testified that Morales [his initial replacement, age 47] was replaced by 'a much younger man', he later admitted that he had no idea why Morales left the company or whether [Morales'] replacement was younger or much younger." *Baralt*, 251 F.3d at 15.

Thus, the First Circuit's application of Law 100 does not raise any issues of federal law, let alone important ones, and does not have any implications beyond Puerto Rico. In any event, the First Circuit, after exhaustively reviewing the evidence, correctly concluded that there was no evidence whatever of age discrimination.

I. THE FIRST CIRCUIT'S DECISION DOES NOT CONFLICT IN ANY SENSE WITH THIS COURT'S DECISION IN *REEVES V. SANDERSON PLUMBING PRODUCTS, INC.*

Petitioners Baralt and Gonzalez strain in an attempt to manufacture a conflict between the First Circuit's decision in this case and this Court's 2000 ADEA decision in *Reeves*. However, there is no such conflict.

First, the First Circuit had made clear several times before its decision in this case that, contrary to Petitioners' characterization, it is not a "pretext plus" circuit. *See, e.g., Dominguez-Cruz v. Suttle Caribe, Inc.*, 202 F.3d 424, 430 n.5 (1st Cir. 2000) ("Evidence that makes out a prima facie case together with evidence of pretext can suffice to defeat summary judgment provided that the evidence is adequate to enable a rational factfinder reasonably to infer that unlawful discrimination was a determinative factor in the adverse employment action. . . . The introduction of additional evidence is not necessarily required. . . . ") (citations and quotation marks omitted). *See also Feliciano de la Cruz v. El Conquistador*, 2000 U.S. App. LEXIS 20182 **3 (1st Cir. 2000) (stating that its

"precedents are consistent with *Reeves*. . . . "),[7] denying rehearing in 218 F.3d 1 (1st Cir.).

Second, in *Reeves* this Court determined only that there could be ADEA cases in which an employee's showing that an employer's justification is false *may* be enough to permit a trier of fact to conclude that the employer discriminated on the basis of age. At the same time, this Court cautioned that such cases are rare:

> This is not to say that such a showing by the plaintiff will *always* be adequate to sustain a jury's finding of liability. Certainly there will be instances where, although the plaintiff has established a prima facie case and set forth sufficient evidence to reject the defendant's explanation, no rational factfinder could conclude that the action was discriminatory. . . .

530 U.S. at 148 (emphasis in original). As if to demonstrate how rare such cases are in fact, this Court emphasized that in *Reeves* itself the employee had introduced significant additional evidence consisting of testimony that one of the employer's officials had repeatedly and disparagingly referred to the employee's age. This Court concluded: "Given that [the employee] established a prima facie case of discrimination, introduced enough evidence for the jury to reject [the employer's] explanation, and *produced additional evidence of age-based animus*, there was sufficient evidence for the jury to find that [the employer] had intentionally discriminated. . . . " *Id.* at

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[7] *See also Feliciano de la Cruz*, 218 F.3d at 10.

153-54 (emphasis added). Thus, as the First Circuit found, *Reeves* is a far cry from this case.[8]

Third, in the course of its thorough analysis of Law 100 and the evidence presented at trial, the First Circuit pointed out that while "Law 100 differs from the ADEA in that the defendant bears the burden of disproving discrimination, the factors we consider in assessing the evidence are the same". *Baralt*, 251 F.3d at 19 n.11. It then expressly distinguished *Reeves* on the "strength of Nationwide's evidence of a legitimate investigation. . . . " *Id.* There is no indication at all that the First Circuit incorporated any kind of a "pretext plus" standard into its assessment of the evidence under either the ADEA or Law 100.[9] The First Circuit repeatedly observed throughout its Law 100 discussion that there was no evidence

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[8] Contrary to Petitioners' contention, *Reeves* clearly does not stand for the proposition that a prima facie case under the ADEA, coupled with the jury's disbelief of a defendant's proferred explanation, is always enough to sustain a jury's finding of liability for age discrimination. Apparently, Petitioners' position is that a reviewing court can *never* overturn a jury's finding of age discrimination. *See* p. 19 of their Petition.

[9] The Petitioners' argument at p. 7 of their Petition, that somehow the First Circuit incorporated a "pretext plus" standard into its Law 100 analysis, is a transparent "back door" attempt to create a conflict between the First Circuit's decision and *Reeves*. It is obviously incorrect because Law 100's burden-shift favors *plaintiffs*, while a "pretext plus" requirement favors *defendants*. Moreover, even if, by some stretch of the imagination, a "pretext plus" standard had been incorporated into Law 100 by the First Circuit, that would obviously raise only a question of Puerto Rico law, and not one of federal law.

whatever of age discrimination on which to base the jury's verdicts against Nationwide.

Thus, the First Circuit's decision is not only not inconsistent with *Reeves*, as Petitioners claim, but it actually follows *Reeves*.[10]

II. THE FIRST CIRCUIT'S DECISION IS BASED ON PUERTO RICO'S LAW 100, NOT THE ADEA.

The Petitioners' contention that the First Circuit's decision conflicts with this Court's decision in *Reeves* fails for another reason. At oral argument, Petitioners explicitly agreed with the First Circuit (as did Respondent Nationwide) that if they were not entitled to recover under Puerto Rico's Law 100 with its more favorable pro-plaintiff standard, then they surely could not recover under the ADEA.[11] And this is what in fact happened: the First Circuit correctly determined that, as a matter of

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[10] Petitioners may in reality be arguing that the First Circuit misapplied *Reeves*. But even if they are doing so, not only are they incorrect, but this is surely not an issue worthy of the exercise of this Court's certiorari jurisdiction. This Court's Rule 10 declares that certiorari is "rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law."

[11] The First Circuit stated: "The parties agree that, if we were to conclude that plaintiffs are not entitled to recover under Law 100, they also would have failed to prove age discrimination under the ADEA because Law 100 offers a 'significantly more favorable' standard to plaintiffs than does the ADEA. . . . Our analysis therefore begins with Law 100, and, because we conclude that plaintiffs have not shown a violation of that statute, it ends there." *Baralt*, 251 F.3d at 16 (citation omitted).

Puerto Rico law, Petitioners could not recover under Law 100. Accordingly, they could not recover under the ADEA either. It was because the parties agreed with this sound assessment by the First Circuit of the relationship between Law 100 and the ADEA that the First Circuit devoted its attention to the question whether there was sufficient evidence of age discrimination under Law 100 to support the jury's verdicts against Nationwide.

The Petitioners thus effectively waived any argument they might have had under the ADEA. But even if there was no waiver, the First Circuit's ruling that Petitioners could not prevail was based primarily on its interpretation of Law 100, not the ADEA. The First Circuit carefully considered Law 100's favorable burden-shift. It then scrupulously evaluated the evidence presented at trial in light of Law 100 and concluded that no reasonable jury could have found against Nationwide on the Law 100 claims. This conclusion on an issue of the proper application of Puerto Rico law should be deferred to by this Court,[12] just as this Court deferred to the Eleventh Circuit's interpretation of Alabama law on the state policymaker vs. county policymaker issue in the Section 1983 case of *McMillian v. Monroe County*, 520 U.S. 781 (1997). Indeed, this case is an even stronger one for such deference

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[12] Law 100 is no stranger to the First Circuit. In fact, the First Circuit has, on several occasions, closely analyzed the extent of Law 100 based on the interpretation of that statute by the Supreme Court of Puerto Rico. *See, e.g., Cardona Jimenez v. Bancomercio de Puerto Rico*, 174 F.3d 36 (1st Cir. 1999); *Ramos v. Davis & Geck, Inc.*, 167 F.3d 727 (1st Cir. 1999); and *Alvarez-Fonseca v. Pepsi Cola of Puerto Rico Bottling Co.*, 152 F.3d 17 (1st Cir. 1998), *cert. denied*, 526 U.S. 1123 (1999).

because the First Circuit's decision on Law 100, unlike the Eleventh Circuit's decision on the policymaker issue, does not implicate federal law at all.

In short, the First Circuit's decision, because it is based primarily on Puerto Rico's Law 100, does not raise an issue of federal law. To grant certiorari would be inconsistent not only with this Court's certiorari jurisdiction but with federalism as well.

III. THIS CASE DOES NOT HAVE FAR-REACHING IMPLICATIONS BECAUSE IT DEALS WITH PUERTO RICO LAW, IT IS FACT-SPECIFIC AND IT DOES NOT RAISE AN IMPORTANT FEDERAL ISSUE.

The First Circuit's decision does not have implications beyond Puerto Rico for several reasons. As noted above, the decision is based primarily on the First Circuit's interpretation of Puerto Rico law, specifically Law 100, and not the ADEA. Also, to the extent the First Circuit found that Petitioners lost on their ADEA claims because they lost as a matter of law on their Law 100 claims, its determination stems from the specific facts of this case.

That the specific facts are what this case is really all about is demonstrated by Petitioners' Petition in which they continue to argue about whether there was any evidence of age discrimination on which to base the jury's verdicts against Nationwide. However, denying

certiorari is particularly appropriate where a Court of Appeals decision is embedded in the specific facts.[13]

All of these considerations demonstrate that the First Circuit's decision does not have any implications beyond Puerto Rico.

IV. THE FIRST CIRCUIT CORRECTLY FOUND THAT THERE WAS NO EVIDENCE OF AGE DISCRIMINATION TO SUPPORT THE JURY'S VERDICTS AGAINST NATIONWIDE.

The First Circuit applied the proper standard of review. *See Baralt*, 251 F.3d at 17. It also recognized the burden-shifting framework established by this Court for ADEA cases in *McDonnell Douglas*. *See Baralt*, 251 F.3d at 16 n.8. As noted earlier, the First Circuit properly addressed this Court's mandate in *Reeves* in light of the evidence:

> The strength of Nationwide's evidence of a legitimate investigation distinguishes this case from *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 . . . (2000), in which the Supreme Court upheld a jury's finding of an ADEA violation based on plaintiff's *prima facie* case and sufficient evidence for a reasonable factfinder to reject the employer's nondiscriminatory explanation for its decision. Although Law 100 differs from the ADEA in that the defendant bears the burden of disproving discrimination, the factors we consider in assessing the evidence are the

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[13] This Court's Rule 10 declares that certiorari is "rarely granted when the asserted error consists of erroneous factual findings. . . ."

> same: the strength of plaintiff's *prima facie* case, the probative value of the proof that the employer's explanation is false, and any other evidence that supports the employer's case and that properly may be considered on a motion for judgment as a matter of law. . . . Here, as we have explained, consideration of these factors, including the failure of plaintiffs' evidence to shed any light on the employer's true reason for firing them . . . reveals the particular weakness of plaintiffs' case. . . .

Baralt, 251 F.3d at 19 n.11 (citations and internal quotation marks omitted).[14]

Next, the First Circuit carefully considered the Puerto Rico Supreme Court's decisions interpreting Law 100. It stated: "We have intently scrutinized the Puerto Rico cases cited to us to see what light they shed on a record as bereft of *indicia* of discriminatory intent as this. In every case we have examined, there was some evidence of discriminatory intent beyond the allegations necessary to make a *prima facie* case of discrimination. . . . " *Baralt*, 251 F.3d at 20 (citations and footnote omitted).

The First Circuit then carefully analyzed the evidence in light of Law 100. In terms of the evidence suggestive of age bias, it first noted that "[i]t is undisputed that the record contains no direct evidence of age discrimination, not even the sorts of stray remarks that are suggestive but often found insufficient to prove discrimination in the

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[14] In light of this discussion by the First Circuit, Nationwide cannot understand how Petitioners can assert at p. 5 of their Petition that the First Circuit paid no attention to the ADEA and *Reeves*.

absence of more meaningful evidence. . . . " *Baralt*, 251 F.3d at 17 (citations omitted). It further noted that Petitioner Gonzalez, who was 60 at the time he was terminated, was replaced by a 43 year old, himself within the protected age group and that Petitioner Baralt was replaced by somebody "only two years his junior, a difference that is insufficient to support even a *prima facie* case of age discrimination. . . . "[15] *Baralt*, 251 F.3d at 17 (citation omitted).

The First Circuit observed that Petitioners' "affirmative showing of age discrimination consisted entirely of three facts: they were within the protected class, they were fired, and one of them was replaced by someone significantly younger – though that individual was still within the protected age group". *Baralt*, 251 F.3d at 17. However, in marked contrast, the First Circuit found as to Nationwide's proffered reasons for the terminations:

> The evidence was undisputed that Nationwide began investigating the Puerto Rico office as a result of [Petitioner] Baralt's report concerning Quinones' allegedly fraudulent conduct, and that the specific probe leading to [Petitioners'] dismissals was triggered by a tip from someone in the office about Lopez's personal use of a salvage vehicle. Robles corroborated the tip for McGoldrick before the investigator traveled to Puerto Rico in April 1994. The inquiry into Lopez's actions led to Gonzalez and Baralt – the former because of his involvement with

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[15] *Baralt*, who was 49 when terminated, learned *for the first time at trial* that his replacement was 47 (i.e., merely 2 years younger).

> the fraudulent automobile policy and the pool cars, and the latter because he was responsible for salvage vehicles.
>
> That the investigation unquestionably was triggered by employees in the Puerto Rico office, rather than by the home office executives who carried out the terminations, makes it unlikely that the inquiry was fabricated as a ruse to accomplish age-based terminations. Moreover, the fact that the investigation was launched in 1993 rules out any rational theory that it was conceived as a device to target [Petitioners], each of whom had received letters of commendation in early 1994. A company seeking pretextual reasons to discharge employees on the basis of their advancing ages would be unlikely to offer thanks for those employees' "efforts and contributions to the successes of this past year."

Baralt, 251 F.3d at 18 (footnote omitted).

The First Circuit further found that Petitioners "presented no evidence to discredit the authenticity of the investigation." *Id.* Consequently, "the evidence was substantial that the firings were in some way a byproduct of the home office probe into the Puerto Rico operations." *Id.* Finally, putting together the evidence and the relevant Puerto Rico case law, the First Circuit concluded:

> In sum, with virtually no evidence besides the discharges themselves pointing to age as a factor and none indicating that the investigation was fabricated by company officials to conceal other motives, a reasonable jury could not entirely reject the company's abundant evidence that the terminations stemmed, however

> unwisely, from the investigation. Even under Law 100's pro-plaintiff system of shifting burdens, Baralt and Gonzalez could not prevail with the mere allegation of age bias that established their prima facie case once Nationwide presented uncontroverted evidence of a real, if overly aggressive, inquiry into office protocols. . . .

Baralt, 251 F.3d at 19 (citation omitted).[16]

The First Circuit is surely correct that under these circumstances the jury's age discrimination verdicts against Nationwide should not stand. These verdicts were based not on the evidence presented but rather on the jury's displeasure with Nationwide's allegedly harsh treatment of the Petitioners.

CONCLUSION

This case does not involve a conflict between the First Circuit's decision and this Court's decision in *Reeves*. Rather, the First Circuit's decision is primarily based on its expert interpretation and application of Puerto Rico's

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[16] The First Circuit explained its reasoning as follows:

> If this record were enough, the result would be a virtual merging of Law 80, which bars unjust dismissals, with Law 100. Notwithstanding Law 100's presumption, proof of unjust cause cannot suffice to establish liability where there is considerable evidence of a non-discriminatory reason for the discharge and no evidence of age bias other than the employee's age. . . .

Baralt, 251 F.3d at 20.

Law 100, and this Puerto Rico statutory provision does not implicate federal law at all. In addition, the First Circuit's decision is very fact-specific. Thus, this case has no implications beyond Puerto Rico. For all of these reasons, Respondent Nationwide respectfully requests that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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